77-349

Supreme Court, U. S.
FILED
AUG 24 1977
MICHAEL RODAK, JR., CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

Richard Denton, Gay E. Powers
and Ray E. Powers
Petitioners,

v.

United States of America

Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Richard Denton, Gay E. Powers and Ray E. Powers, pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on the Twenth First Day of June, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, as yet unreported, appears at Appendix A, of this petition, pp. 1-11.

JURISDICTION

The Opinion and Judgment of the United

States Court of Appeals for the Sixth Circuit, was entered on the Twenty First Day of June, 1977. See Appendix A, P. 1, infra. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Whether the United States Court of Appeals, Sixth Circuit, erroneously concluded that the trial judge did not violate the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended in 1970, 18 U.S.C. §2510-2520, by holding that the trial judge was not required to play the entire original recordings of intercepted telephone conversations into evidence and thus did not abuse his discretion by admitting into evidence as summaries, composite tape recordings of representative telephone conversations intercepted pursuant to court order and made from duplicate tapes of the original tapes which were intercepted and procured under the provisions of 18 U.S.C. § 2510-2520.

II

Whether the United States Court of Appeals erroneously concluded that the jury instructions as a whole given by the trial judge correctly instructed the jurors as to the elements of the offenses charged and thus were not so manifestly prejudicial as to lead to a miscarriage of justice when said instructions failed to distinguish between "mere bettors" and those persons who were actually involved

in the gambling business and further as a matter of law failed to properly instruct on the jurisdictional requirements of the offense charged against petitioners under 18 U.S.C. §§ 1955.

III

Whether the United States Court of Appeals, Sixth Circuit, erroneously conduded that the substantive evidence presented at petitioners' trial supported the jurisdictional requirements of the offenses charged under 18 U.S.C. §§ 1955(b) in that there was no showing at trial that five or more persons were involved in the gambling operation for at least thirty days from November 23, 1974 to January 12, 1975; that said gambling operation was or remained in substantially continuous operation for a period in excess of thirty days, since, there was no proof of any gambling operations presented at the trial for the period between December 12, 1974 and January 12, 1975; and that there was no showing by the evidence presented at trial that established as required by the act that Petitioners had a gross revenue of $2,000 in a single day which resulted from a violation of the law of a State or political subdivision.

STATUTORY PROVISIONS INVOLVED:

18 U.S.C. §§ 2515. Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative

committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. §§ 2517. (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

18 U.S.C. §§ 2518 (8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. §§ 1955 (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section -
(1) "illegal gambling business" means a gambling business which -

(i) is a violation of the law of a State or political subdivision in which it is conducted.

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking. maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

STATEMENT OF FACTS

Petitioners, Richard Denton, Gay E. Powers and Ray E. Powers were charged in a two count indictment, tried, and convicted by a jury on July 9, 1976 of Conspiracy to Conduct and Conducting an illegal gambling operation in violation of 18 U.S.C. §§ 1955. Thereafter, all three petitioners appealed their convic-

tions to the United States Court of Appeals, Sixth Circuit and on June 21, 1977, that Court affirmed their convictions in a written opinion filed on that date.

The pertinant facts giving rise to the issues in this opinion are hereinafter set out.

On November 22, 1974 the District Court authorized Special Agents of the FBI to intercept the telephonic communications of the Powers brothers and two other persons and to make penregister recordings of the numbers dialed. The Special Agents proceeded forthwith to tap and to record the conversations of the telephone calls from the Petitioners' telephone lines. The wiretaps were authorized for twenty days from November 23, 1974 to December 12, 1974. The Agents also received court authorization for three more days of telephone interceptions beginning on January 12, 1975. There were no telephone interceptions between December 12, 1975 and January 12, 1975.

The original tapes of the conversations intercepted remained sealed until the seal was broken at the trial. Copies of the original tapes were made at the end of each days' interception activities.

Federal Bureau of Investigation Special Agent Van Harp instructed the agents in making a composite tape and verbatim transcripts of the intercepted conversations from the duplicate tapes. Agent Van Harp testified at trial that he selected certain calls from the tapes that he thought best illustrated the

alleged bookmaking operation. The composite tape consisted of a selection of about 39 telephone calls between the Petitioners and other persons which illustrated the bookmaking operation under investigation. The composite tape showed the betting operations of the appellants and the involvement of persons such as Maurice Ramont and Harry DeRose in the operation from November 26, 1974 to December 12, 1974.

At trial the attorney for all three petitioners objected to the selected introduction of the composite tapes and verbatim transcripts of the composite tapes on the grounds that all of the tapes of the intercepted conversations during the period of authorized surveillance should be introduced not just selected versions and that the original tapes should be used and not copies and transcripts of composite copies when the originals were available. Over counsel's objection only the composite tapes were played to the jury and verbatim transcripts of the composites were distributed to the jury. Though all of the original tapes were introduced into evidence, none of these were played to the jury as such.

Also at the trial, Special Agent William Holmes of the FBI testified as a government expert on gambling. Agent Holmes testified he had heard the composite tape, had read the verbatim transcript of the tape, and had examined the items seized from searches made on January 13, 1975. He testified from this evidence that a bookmaking operation, consisting of at least nine participants, was in existence

from November 23, 1974 to January 13, 1975. He stated that five of these participants were the Powers brothers, Denton, Harry DeRose and Maurice Ramont.

Agent Holmes said that the Powers brothers were the managers or partners in this gambling organization; that Richard Denton was an employee of the organization who accepted bets, disseminated information to customers and informed the customers of the amounts owed to or by the bookmaker; that Harry DeRose was a "writer" for the organization; that Maurice Ramont was a bookmaker who placed wagers with and accepted wagers from Denton; and that most of their wagers were layoff wagers.

From the composite tape Agent Holmes testified that the organization took in a minimum of the following amounts of money on the following dates:

November 25, 1974	$ 800
November 26, 1974	120
November 27, 1974	900
November 29, 1974	1,500
November 30, 1974	2,100
December 2, 1974	800
December 6, 1974	1,130
December 7, 1974	1,900

After Agent Holmes had examined the yellow spiral notebook taken from Denton's office pursuant to a January 13, 1975 search, Agent Holmes testified that the organization took in $6,425 on January 12, 1975. He attributed this large intake from the betting on the Super Bowl football game.

At the close of the trial the court instructed the jury on the purported elements of the offense and the jury thereafter returned verdicts of guilty as to all three defendants as to both counts in the indictment.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Directly Conflicts With the Express Mandate Of The Congress Of The United States When It Enacted The Provisions of 18 U.S.C. §§ 2510-2520, And Thereby Contravenes The Concept Of Strict Construction of A United States Statute That Allows Such An Intrusion Of The Right Of Individual Privacy Otherwise Protected By The Constitution Of The United States.

At Petitioners' trial the trial judge ruled and on appeal the United States Court of Appeals sanctioned the action of the trial court in allowing the government to introduce duplicate excerpts of tapes and selected verbatim transcripts of taped telephone interceptions rather than requiring the introduction and playing to the jury of the originals of those interceptions. While the original tapes were technically introduced into evidence, only the copies of excerpts and the verbatim transcripts were played and displayed to the jury.

This the petitioners contend clearly contrevenes the express provisions of the statute under which these telephone interceptions and recordings were originally acquired by the government investigative

agents. 18 U.S.C. § 2518 (8)(a) which is the statute that allows for and in turn regulates wiretapping provides that ".... the recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the record from editing or other alterations. .... Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517." (Emphasis Added)

Clearly the statute prohibits editing of the tapes for any purpose and only allows for the making of duplicate recordings in the case of investigations pursuant to the provisions of subsections (1) and (2) of 18 U.S.C. § 2517. Subsection (1) of section 2517 (18 U.S.C. 2517 (1)), provides for the use of the intercepted communications to the extent such use is appropriate to a law enforcement officer in the proper performance of his official duties.

18 U.S.C. § 2517 (3) allows for the introduction of the contents of intercepted telephonic communications but in no way expressly allows for or condones the use of selected composite tapes or verbatim transcripts of selected excerpts which would by definition constitute edited

copies of the original tapes of said intercepted conversations. It is clear that these three sections read together evinces a succint and logical expression on the part of the Congress that the only time duplicate tapes edited or otherwise can be used is for investigative purposes and none other.

18 U.S.C. § 2515 supports the contention that the Congress intended for the provisions of 18 U.S.C. § 2510-2520 be strictly complied with for this section clearly holds that if strict compliance thereunder has not occurred that evidence received thereunder cannot be introduced before any court.

Recognizing that the provisions of 18 U.S.C. § 2510-2520 represent a substantial intrusion into the privacy of citizens of the United States which is so clearly protected by our Constitution it seems paramount that such a statute and its provisions should be strictly construed by the Courts. The action of the trial court and the United States Court of Appeals departs from this basic principle. The United States Supreme Court should therefore act in this instance to limit and strictly construe the application of the provisions of this statute to petitioners and all other citizens similarly situated and decide the issue here presented on the basis of a strict construction of the of the statute in question.

II

The Decision Below Which Held That

The Trial Court Was Not Required To Instruct The Jury On The Issue Of Whether Or Not A Mere Bettor Could Be Included As One Or More Of The Five Persons Required To Be Engaged In The Gambling Enterprise Under The Terms Of 18 U.S.C. § 1955(B) Constitutes A Manifest Miscarriage Of Justice As To Petitioners And Others Similarly Situated And The Question Should Be Resolved By The United States Supreme Court.

While there do not appear to be any United States Supreme Court Decisions dealing specifically with the question herein raised by petitioners, there are a number of United States Court of Appeals decisions that have clearly held that "mere bettors" cannot be included in the computation of the Five or more persons that "conduct finance, manage, supervise, direct, or own all or part of such business". 18 U.S.C. § 1955 (b)(1)(ii). See United States v Riehl, 460 F2d 454 (1972)(CA 3rd); United States v Smaldone, 485 F2d 1333, 1351 (1973)(CA 10th); United States v Schaifer, 510F2d 1307, 1311, (1975)(CA 8th); United States v Schullo, 508 F2d 1200, 1205 (1975)(CA 8th).

The trial court in the instant case failed to instruct the jury specifically that "mere bettors" could not be considered by them in computing the "five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business" 18 U.S.C. § 1955 (b)(1)(ii). The failure to give such an instruction in the instant case constituted a flagrant violation of the basic rights of petitioners in that there was conflicting testi-

mony presented at trial which would have brought into question, as a question of fact for the jurors whether or not there were indeed five or more persons engaged in the alleged gambling enterprise as required by the statute.

III

The Decision Below Resulted In The Affirmance Of Petitioners' Conviction In The Trial Court When There Was Not Adequate Proof To Establish The Jurisdictional Requirements Of 18 U.S.C. § 1955 (B) And Therefore Resulted In The Improper And Illegal Convictions Of Petitioners So As To Violate Their Respective Rights To Due Process Of Law.

18 U.S.C. §§ 1955 (B) requires the United States by definition to establish by appropriate evidence the following:

1) that the gambling business in question is conducted in violation of a Law of a State or political subdivision in which it is conducted; and

2) that the gambling enterprize involves five or more persons, and

3) (a) that it has been or remains in "substantially continuous operation for a period in excess of thirty days or

(b) has a gross revenue of $2,000 in any single day.

The Due Process Clause of the United States Constitution clearly requires

that no person should be convicted of an offense if the evidence presented against such a person does not establish the jurisdictional requirements set out in the statute under which said person has been prosecuted.

In the instant case the testimony presented against petitioners clearly established that there had not been a continuous gambling operation for a period of thirty days as required by 18 U.S.C. § 1955 (b)(1)(iii). The testimony presented at trial clearly showed that there was no apparent gambling activity between December 12, 1974 and January 12, 1975. (Trial Transcript pages 130, 241, 243, 288, 291 and Exhibit II) The proofs presented at trial demonstrated, if considered in the light most favorable to the government that from November 23, 1974 through December 12, 1974 gambling activity occurred. This comprises a period of 21 days. The evidence presented by the Government at trial then shows that there was gambling activity that occurred for approximately three days on and after January 12, 1975.

This by no means can support the contention that there were gambling operations in "substantially continuous operation" for a period of thirty days as required by the statute, particularly as this issue relates to Petitioners, Ray E. Powers and Gay E. Powers.

The evidence presented at trial clearly shows that the Petitioners, Ray E. Powers and Gay E. Powers assumed the role on and after January 12, 1975 as "mere bettors".

(Trial Transcript 243, 245, 290, 291)

The alternative, therefore, that the Government had at trial and likewise on appeal was to establish the jurisdictional requirements of the statute in question under the alternative provision of 18 U.S. C. § 1955(B)(iii) which requires a showing that the gambling enterprise had gross receipts or revenue of $2,000 in a single day of operation. As to Petitioners, Ray E. Powers and Gay E. Powers this fact was not shown at trial. The alleged receipts that were received on November 30, 1974 of $2,100 are the only figures that exceed the statutory limit of $2,000 for the period beginning November 23, 1974 through December 12, 1974.

The transcript and exhibits at trial established only that the petitioner Ray E. Powers had said in a telephone conversation with Richard Denton on November 30, 1974 that he had made about "two grand or a little more" on bets in horse racing. (Trial Transcript page 100: Exhibit 7) It is apparently this telephone conversation that was used by the Government Expert Witness, Agent Holmes, to establish that the gambling enterprise had receipts on November 30, 1974 of $2,100. The United States Court of Appeals in its opinion relied upon this same factor in concluding that the jurisdictional requirements of the statute had been met. See United States Court of Appeals Opinion Appendix A, page 10 and 11.

However, In the State of Michigan it is not illegal to bet money and otherwise wager on horse races, as long as, such

betting occurrs at a State Licensed Race Track. There was nothing in the evidence presented at the trial in this case to establish that the two thousand dollars referred to in the conversation between Petitioner Denton and Petitioner Ray E. Powers on November 30, 1974 was earned in an illegal manner and therefore in violation of the Laws of the State of Michigan as is required by 18 U.S.C. § 1955 (B)(1)(i).

As to the sums allegedly received by the Gambling Operation on January 12, 1975, the only basis for the conclusion that the organization received $6,425 on that date was an opinion of the Expert Agent Holmes based upon composites of intercepted telephone conversations and tapes which were not introduced into evidence at the trial. (Trial Transcript pages 223, 224, and 225)

Thus in light of the testimony and evidence presented at the trial of petitioners and the evaluation of same by the United States Court of Appeals, Sixth Circuit it is clear that the courts below erroneously concluded that the jurisdictional requirements for a conviction of Petitions under 18 U.S.C. § 1955 was established.

CONCLUSION

For the reasons herein stated a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals Sixth Circuit in this cause.

Respectfully submitted,

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Attorney for Petitioners

Dated: August 22, 1977

APPENDIX A No. 76-2693

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD DENTON, GAY E. POWERS and RAY E. POWERS,
Defendants-Appellants.

APPEAL from United States District Court for the Western District of Michigan, Southern Division.

Decided and Filed June 21, 1977.

Before: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

WEICK, Circuit Judge. Appellants have appealed from judgments of conviction by a jury and from sentences on a two-count indictment charging them with conspiracy to conduct and with conducting an illegal gambling operation, in violation of 18 U.S.C. §§ 1955 and 371.[1] Denton was sentenced on the substantive offense charged in Count II to eight days in jail, three years probation, and $1800 fine. Gay Powers and Ray Powers, who are brothers, were each sentenced on the

[1] Ray Powers was also convicted on two counts: the illegal use of interstate wire communications to transmit bets and wagers (Count I) and transmitting information to assist the same (Count II), in violation of 18 U.S.C. § 1084(a). Gay Powers also was convicted on Count I for violating 18 U.S.C. § 1084(a). Neither of these convictions is involved in this appeal; however, their sentences on these convictions have been deferred until the outcome of their appeals in the present case.

substantive offense charged in Count II to four days in jail, three years probation, and $1200 fine. The sentence of each appellant on his conspiracy conviction on Count I was suspended, and each was placed on three years probation. The sentences on the two counts were to run concurrently.

Appellants have raised three questions: *One*, whether the trial judge abused his discretion in admitting into evidence as summaries, composite tape recordings of representative telephone conversations intercepted pursuant to court order and made from duplicate tapes of the original tape recordings which were procured under the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and as amended in 1970, 18 U.S.C. §§ 2510-2520; *Two*, whether the trial judge properly instructed the jury on the elements of the offense under 18 U.S.C. § 1955; and *Three*, whether the Government established the jurisdictional requirements under 18 U.S.C. § 1955.[2] We affirm appellants' convictions.

[2] 18 U.S.C. §§ 1955(a) and (b) provide:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
>
> (2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.
>
> (3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

I

On November 22, 1974 the District Court authorized Special Agents of the FBI to intercept the telephonic communications of the Powers brothers and two other persons and to make pen-register recordings of the numbers dialed. The Special Agents proceeded forthwith to tap and to record the conversations of the telephone calls from the suspects' telephone lines. The wiretaps were authorized for twenty days from November 23, 1974 to December 12, 1974. The Agents also received court authorization for three more days of telephone interceptions in January, 1975.

The Agents did not monitor private personal calls on the interceptions, and they made pretext calls to ensure that the interceptive devices were installed properly on the correct telephone lines. The Agents also made five-day reports to the court on the progress of the investigation.

At the end of each day of the interceptions the Agents made copies of the taped communications and turned over the original tapes to FBI Special Agent Van Harp. Agent Harp put the originals in a safe and sealed them on December 13, 1974. On December 16, 1974 FBI Special Agent Norman Simon delivered the sealed tapes to the Court. The original tapes remained sealed until the seal was broken at the trial.

Agent Harp instructed the agents in making a composite tape and verbatim transcripts of the intercepted conversations from the duplicate tapes. The composite tape consisted of about 39 telephone calls[3] between the appellants and other persons which illustrated the bookmaking operation under investigation. Approximately 963 telephone calls were monitored during the investigation. The composite tape showed the betting operations of the appelants and the involvement of persons such as Maurice Ramont and Harry DeRose in the operation from November 26, 1974 to December 12, 1974.

[3] About seven telephone calls involving the § 1084(a) offenses were also included as part of the composite tape.

At the trial before a jury Special Agent William Holmes of the FBI testified as a government expert on gambling. Agent Holmes had heard the composite tape, had read the verbatim transcript of the tape, and had examined the items seized from searches made on January 13, 1975. He testified from this evidence that a bookmaking operation, consisting of at least nine participants, was in existence from November 23, 1974 to January 13, 1975. He stated that five of these participants were the Powers brothers, Denton, Harry DeRose and Maurice Ramont. Agent Holmes said that the Powers brothers were the managers or partners in this gambling organization; that Richard Denton was an employee of the organization who accepted bets, disseminated information to customers and informed the customers of the amounts owed to or by the bookmaker; that Harry DeRose was a "writer" for the organization; that Maurice Ramont was a bookmaker who placed wagers with and accepted wagers from Denton; and that most of there wagers were layoff wagers.[4]

From the composite tape Agent Holmes testified that the organization took in a minimum of the following amounts of money on the following dates:

November 25, 1974	$800
November 26, 1974	120
November 27, 1974	900
November 29, 1974	1,500
November 30, 1974	2,100
December 2, 1974	800
December 6, 1974	1,130
December 7, 1974	1,900

After Agent Holmes had examined the yellow spiral notebook taken from Denton's office pursuant to a January 13, 1975 search, Agent Holmes testified that the organization took in

[4] Agent Holmes defined a layoff wager as a "rebetting of wagers from one bookmaker to another" in order to balance one bookmaker's book, i.e. one bookmaker "takes the excess that he feels he cannot handle and bets it with another bookmaker."

$6,425 on January 12, 1975. He attributed this large intake from the betting on the Super Bowl football game.

The composite tape and all of the original tape recordings were admitted into evidence at the trial.

II

Appellants' principal argument is that all of the original tapes of the intercepted telephone conversations, rather than the composite tape made from the duplicate copies, should have been played at the trial, pursuant to 18 U.S.C. §§ 2510-2520. They contend that the admission of the composite tape into evidence was reversible error. We disagree.

Counsel for appellants objected to the admission of the composite tape in evidence on the ground that it was made up of elements of other tapes and had been edited in order to make it composite. Counsel stated, "I feel that the original tape is the one that should be used and not the edited one." The ruling on the objection was as follows:

> The Court: Mr. Brooks, the rules of evidence provide that in a case where there is lengthy and investigative documentary or oral or recorded testimony, that it is within the discretion of the Court to permit excerpts to be used. I think that is Federal Rule 1006, 28 U.S. Code.[5] And looking from the size of the original tapes

[5] Rule 1006 Fed. R. Evid. provides:

> Summaries. The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 1003 Fed. R. Evid. provides:

> Admissibility of Duplicates. A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

No genuine question as to authenticity was raised and no unfairness was shown.

that are here, I think we'd be here for three weeks if we listened to the originals entirely, knowing full well there is material in those tapes that has no bearing on this case.

Overrule your objection and permit the excerpted parts to be used. [Footnote added.]

In *United States* v. *DiMuro*, 540 F.2d 503 (1st Cir. 1976), *cert. denied*, — U.S. —, 45 U.S.L.W. 3463 (U.S. Jan. 10, 1977), the Court held at page 512:

> The admissibility of recordings of intercepted conversations or parts thereof is a matter committed to the sound discretion of the trial court.[14] *Gorin* v. *United States*, 313 F.2d 641, 652 (1st Cir. 1963); *Todisco* v. *United States*, 298 F.2d 208, 211 (9th Cir. 1961), *cert. denied*, 368 U.S. 989, 82 S. Ct. 602, 7 L.Ed.2d 527 (1962). And the use of a composite trial tape of particular intercepted conversations which the government considered relevant to the trial has been permitted. *See, e.g., United States* v. *Lawson*, 347 F. Supp. 144, 147-49 (E.D.Pa. 1972).

[14] Although only the composite tape was played for the jury, all the recorded conversations were received in evidence. And appellants were afforded the opportunity to examine the original tapes of all the intercepted conversations.

In *United States* v. *Whitaker*, 372 F. Supp. 154, 164 (M.D. Pa.), *aff'd without published opinion*, 503 F.2d 1400 (3d Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975), the District Court ruled that it was proper to admit into evidence and to play at trial a summary tape of selected conversations ("master tape") of original recordings of FBI interceptions of telephone conversations when the summary tape was authentic, accurate, and would conserve time at trial by its use.

Similarly, the Court of Appeals of New York in *People* v. *Nicoletti*, 34 N.Y.2d 253-54, 356 N.Y.S.2d 855, 313 N.E.2d 336

(1974), cognizant of 18 U.S.C. § 2518(8)(a), specifically approved re-recording the original tapes of intercepted telephone conversations in order that the duplicate recordings be used "for the purposes of transcription and preparation of composite recordings" as "prudence alone dictates that such tasks be done with duplicate not original recordings" to avoid damage to the original recordings. *See also United States* v. *Ricco*, 421 F. Supp. 401, 408-09 (S.D.N.Y. 1976), and *People* v. *Sher*, 38 N.Y.2d 600, 604-05, 381 N.Y.S.2d 843, 345 N.E.2d 314 (1976).

In *United States* v. *Scully*, 546 F.2d 255, 270 (9th Cir. 1976), *judgment vacated on other grounds, sub nom. United States* v. *Cabral*, — U.S. —, 45 U.S.L.W. 3586 (U.S. Feb. 22, 1977), the Court approved the introduction into evidence of a single master tape of all the intercepted conversations. The Court said:

> The procedure saved considerable time by eliminating the need to switch tape reels continually. The master tape had quality equal to the originals. The defendants had opportunity to examine the originals.[6] [Footnote added]

The docket entries in the District Court reveal that on September 25, 1975 there was a pretrial conference of the attorneys meeting with the United States Attorney, before the District Court, to hear tapes and to obtain transcripts. They were to report back to the Court by the end of October.

There is no claim made by appellants that this did not occur. Thus appellants' counsel had ample opportunity over a long period of time to listen to all of the tapes if he cared to do so. At the trial he had full opportunity to cross-examine the

[6] Apparently the master tape was used in the *Scully* case to increase the clarity of the original tapes. Such a procedure has been approved in other cases. See *United States* v. *Madda*, 345 F.2d 400, 402-03 (7th Cir. 1965); *United States* v. *Hall*, 342 F.2d 849, 852-53 (4th Cir.), *cert. denied*, 382 U.S. 812 (1965); and *Johns* v. *United States*, 323 F.2d 421 (5th Cir. 1963).

Special Agents of the FBI with respect to the composite tape and to offer proof if he contended that the tape was improperly prepared. He was given further opportunity to make a comparison at the trial.

Thus, the requirement of Rule 1006 providing defense counsel a "reasonable time and place" to examine the tapes in question was complied with by the Government. Further, the prosecution laid the proper foundation on the accuracy and authenticity of the composite tape for its admission into evidence. Moreover, the use of the composite tape at trial saved the Court much time and inconvenience. *United States* v. *Scully, supra;* and *United States* v. *DiMuro, supra* at 512-13.

Appellants offered no proof questioning the accuracy or authenticity of the composite tape.

We are of the opinion that the District Court did not abuse his discretion in admitting the summaries in evidence.

Finally, we do not see any error in Agent Harp's preparation of the composite tape for the prosecution. Fed. R. Evid. 1006. In the cases discussed above the prosecution in each case prepared the composite tapes for trial. Furthermore, the Government, in the present case, laid a proper foundation for the introduction of the composite tape through the testimony of the agents who prepared the composite tape. See 5 Weinstein's Evidence, ¶ 1006[06] (1975). Defense counsel had adequate opportunity to cross-examine the agents as to any lack of authenticity or acuracy in the composition, preparation, and presentation of the composite tape. In fact, the trial judge noted to appellants' counsel that "the jury will understand this is a Government-chosen excerpt, and is to be viewed as such." *Compare United States* v. *Lawson*, 347 F. Supp. 144, 149 (E.D.Pa. 1972).

We are further of the opinion that in the procuring, sealing, and safe keeping of the original tapes the statute, Sections 2510 *et seq.*, was strictly complied with, and we find no violation of the statute in the preparation of the summaries and their admission in evidence.

III

Appellants also argue that the Court erred in instructing the jury as to the elements of the § 1955 offense. They contend that the instructions did not distinguish between "mere bettors" and those persons who were actually involved in the gambling business, and that the instructions on the jurisdictional requirements of § 1955 were incorrect as a matter of law. We disagree.

Defense counsel neither presented to the trial judge alternative jury instructions, nor objected to the jury instructions as given. Therefore, appellants are not now in a position to object, Fed. R. Crim. P. 30, unless the instructions are so manifestly prejudicial as to lead to a miscarriage of justice. We do not find them so to be. Fed. R. Crim. P. 52(b). *United States* v. *Faulkner*, 538 F.2d 724, 728 (6th Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3431 (U.S. Dec. 13, 1976); and *United States* v. *Vigi*, 515 F.2d 290, 293 (6th Cir.), *cert. denied*, 423 U.S. 912 (1975).

The instructions as a whole given by the trial judge to the jury correctly instructed the jurors as to the elements of the offense. Many of the contested instructions were taken from instructions previously approved by this Court in *United States* v. *Mattucci*, 502 F.2d 883, 889 (6th Cir. 1974). Thus, plain error was not present.

IV

Appellants further contend that there was insufficient evidence to prove the jurisdictional requirements under § 1955 (b). They argue that the evidence, viewed most favorably to the Government, does not show that five or more persons were involved in the gambling operation for at least thirty days

from November 23, 1974 to January 12, 1975; and that evidence was lacking of any activity by the three appellants and two other persons between December 12, 1974 and January 12, 1975, the interim period in which no wiretaps were authorized.

Also, they argue that the evidence does not show that the organization actually accumulted bets of $2100 on November 30, 1974, or that five persons were still involved in the organization when Denton grossed $6,425 on January 12, 1975. The Government, on the other hand, contends that Special Agent Holmes' testimony alone was sufficient to sustain the conviction.

The record shows that appellants' defense counsel at trial moved for judgment of acquittal at the close of the Government's case, which was denied, but that he failed to renew this motion at the conclusion of all the evidence, after appellants presented evidence on their own behalf. The only witness to testify for the defense was Denton, and his testimony was also admissible as to the Powers brothers. *United States* v. *Mattucci*, 502 F.2d 883, 889 (6th Cir. 1974).

Therefore, appellants waived any objection to the trial court's denial of their motion at the close of the Government's case, and "the issue of sufficiency of the evidence can only be relied upon here under the 'plain error' provision of Rule 52(b), Fed. R. Crim. P." *United States* v. *Swainson*, 548 F.2d 657, 662-63 (6th Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3777 (U.S. May 23, 1977). *See also United States* v. *Black*, 525 F.2d 668, 669 (6th Cir. 1975).

From our examination of the record, plain error was not present. The jurors had the verbatim transcripts of the compositie tape and could weight for themselves the strength of Agent Holmes' testimony as to whether the gambling business had gross receipts of more than $2,000 in a single day. In

one telephone call alone, on November 30, 1974, Richard Denton said to Ray Powers that they had *made* about "two grand or a little more" on bets in horse racing. Thus, in the view most favorable to the Government the evidence was sufficient to support the jurisdictional requirements of § 1955 (b).

The judgments of conviction are affirmed.